No. 3958

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL CIGAR COMPANY, INC., a Corporation,
Plaintiff in Error,

vs.

FIRST NATIONAL BANK OF PORTLAND, a National Banking Corporation,
Defendant in Error.

Brief for Defendant in Error

On Writ of Error to the District Court of the United States, for the District of Oregon.
HON. CHARLES E. WOLVERTON, *District Judge.*

DOLPH, MALLORY, SIMON & GEARIN,
JOHN M. GEARIN,
EDGAR FREED,
Mohawk Building, Portland, Ore.,
Attorneys for Defendant in Error.

DEY, HAMPSON & NELSON,
ROSCOE C. NELSON,
GEORGE L. BULAND,
Yeon Building, Portland, Ore.,
Attorneys for Plaintiff in Error.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

INDEX TO SUBJECTS

TABLE OF CASES Pages

No._____

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL CIGAR COMPANY, INC., a Corporation,
Plaintiff in Error,

vs.

FIRST NATIONAL BANK OF PORTLAND, a National Banking Corporation,
Defendant in Error.

Brief for Defendant in Error

On Writ of Error to the District Court of the United States, for the District of Oregon.
HON. CHARLES E. WOLVERTON, *District Judge.*

STATEMENT

(The numbers in parentheses hereinafter refer to pages of the Transcript of Record, unless otherwise noted.)

The plaintiff is a corporation engaged in the wholesale and retail tobacco business with branches in a number of cities, including Portland, Seattle and Spokane. The defendant is a banking corporation in the City of Portland, Oregon.

The plaintiff brought this action to recover from the defendant the sum of about $10,000, being the total amount represented by several checks which one Neil

W. Turrell cashed at the defendant bank between December 13, 1919, and December 1, 1920, the defendant later collecting them from the drawee bank. The checks were drawn by the plaintiff company payable to itself, some being drawn on a Spokane bank and some on a Seattle bank. They had been sent to the plaintiff's Portland office from its Spokane and Seattle offices respectively as an adjustment for merchandise forwarded to those branches by the Portland office.

Each check is made the subject of a separate cause of action in the complaint, but, all being the same in principle, only the first need be considered. The plaintiff brings the action upon the ground, as alleged in its complaint (3 and 4), that after the check had been received by the Portland office from the Spokane office and had been endorsed with a rubber stamp endorsement, described in the complaint, with the intention of depositing it, Turrell wrongfully and without authority converted the check and wrongfully and without authority cashed it at the defendant bank, and the latter received from the drawee Spokane bank the face of the check without crediting or paying the same to the plaintiff.

A demurrer (26) to the complaint on the ground that it did not state a cause of action was overruled. (29.)

The defendant for an answer denies (31) and puts in issue certain allegations of the complaint including the allegations that Turrell's taking and cashing the check was without authority.

As a first separate defense the defendant sets up affirmatively facts claiming to show that Turrell was not acting without authority.

For a second separate defense (34) facts are alleged setting up an estoppel against the plaintiff by reason of negligence and an account stated. That is, that Turrell had been in the habit of indorsing checks in the manner pointed out, and defendant, because of the authority vested in him by plaintiff, cashed such checks when so presented, and paid the money to Turrell for plaintiff, and the checks were thereupon paid to defendant by the drawee banks, and charged to plaintiff's account; that a proper audit or check of its books and business at Portland and Spokane and the accounts of Turrell would have disclosed to plaintiff the practice of Turrell; that during all the times mentioned there were monthly statements rendered and settlements made between plaintiff and defendant, and between plaintiff and the Spokane bank, and at such settlements plaintiff's cancelled checks and itemized statements of plaintiff's accounts with the respective banks were returned to it by defendant and the Spokane bank, and an account stated was had between plaintiff and each of such banks; that plaintiff at no time prior to January 1, 1921, made objection to such payments by defendant, or claimed that Turrell was without authority to transfer and receive the money on the checks; and that plaintiff by its silence has ratified and confirmed the acts of Turrell in so indorsing and receiving the money upon such checks, and is now estopped to deny that Turrell had authority so to cash the checks.

It is alleged as a third separate defense (37) that the plaintiff learned of the fraud of Turrell long prior to July 20, 1921, but did not notify defendant thereof until that date; that because of such failure to notify defendant promptly of the fraud, defendant was deprived of the opportunity to proceed against Turrell and thereby to obtain from him restitution for the wrong suffered until it was too late to recover anything.

Defendant's fourth separate defense (38) is an equitable defense alleging that the plaintiff recovered from Turrell certain property which the defendant had an equitable right to have applied toward any claim which the plaintiff should be held to have against the defendant by reason of the matters alleged in the complaint.

A demurrer (40) to defendant's third separate defense was overruled (42).

The reply (43) of the plaintiff traverses some of the new matters in defendant's answer, and admits Turrell's authority to deal with the checks in question to the extent of endorsing and transferring them to the defendant for deposit and then by check, drawing out the amount deposited.

The case was tried to a jury. The fourth separate answer, being an equitable defense, was not for the consideration of the jury and was left for the Court, the parties stipulating on the subject. (73.)

Summarized, the facts brought out at the trial are as follows: Prior to July 1, 1919, Neil W. Turrell had been employed by the plaintiff General Cigar Company as bookkeeper, and on that date he was promoted to the position of cashier of the Portland office of the com-

pany, which place he held during all the times the checks mentioned in the complaint were cashed by him. In that position he had charge of the office, of the cash, of the bank statements, and of all the books, records and accounts; he had authority to indorse checks just as the checks mentioned in the complaint were indorsed and to take them to the defendant bank and deposit them. He was the only one at the plaintiff's Portland office who had to do with the examination of returned bank statements and vouchers, and no one checked his doings and practices or any of the records over which he had control except at the annual audit. Written authority to draw checks on the plaintiff's account in the defendant bank was conferred upon him. The letter of authority appearing on page 74 of the transcript is the writing referred to, and that was the only written authority conferred upon Turrell. Deposits in the defendant bank were generally made by the plaintiff's bookkeeper but sometimes Turrell made them. The checks would be stamped with a rubber stamp indorsement such as appeared on the checks described in the complaint and deposited. The form of the indorsement was "Pay to the order of the First National Bank, General Cigar Company, Inc." No one checked up Turrell's examination of the statements and vouchers returned to the plaintiff by the defendant bank except at the annual audit. San Francisco was the audit center and returned vouchers, etc., were sent there from the various offices of the plaintiff.

In 1920 the business of the Portland branch of the plaintiff showed a leak. The plaintiff believed it to be a stock shortage and had the stock books audited, but

the auditors found nothing wrong. At the end of 1920 the business again showed a leak. On December 31, 1920, Turrell was discharged, his work having become careless and lacking enthusiasm. Another audit of the books and accounts failed to reveal the leak and no shortage was found in the stock. Turrell was requested by the plaintiff to, and did, remain a short time after his discharge and pretended to assist in the last mentioned audit. When that audit failed to catch the leak detectives were called in and they directed attention to Turrell. At the same time the plaintiff's San Francisco office, which was the company's audit center, and to which the cancelled checks were sent, discovered checks which Turrell had made payable to "cash" and received the money on, marking the corresponding stubs void or cancelled. Turrell was arrested and plaintiff took steps to attach certain of his property. On May 28, 1921, he confessed that he had embezzled funds of the plaintiff in two ways: 1. Drawing checks on the plaintiff's account in the defendant bank payable to "cash" and misappropriating the money; 2. Cashing the checks described in the complaint and misappropriating the money. These practices had run through a period of about a year. The plaintiff did not on said May 28, 1921, notify the defendant bank of the fraud claimed, and did not notify them of it at any time until July 20, 1921. Plaintiff's witness testified that it took until that date to make up a complete statement of the amount of the checks cashed as complained of in the complaint.

It appeared from the testimony that the checks were drawn and indorsed in the manner set forth in the com-

plaint, and were cashed by the defendant which, in turn, collected them from the drawee banks; and that except for the payments made at the time of cashing the checks, the defendant never made any payments to the plaintiff by reason thereof.

It appeared from the testimony that the checks in question were sent from the Seattle and Spokane offices of the plaintiff company as an adjustment for merchandise sent from the Portland office to those offices; that when the merchandise was shipped from the Portland office, it should have been noted and an entry made on the records at the Portland office, and when a check was received from the Seattle or Spokane office in payment, it should have been noted in the cash account and on the records at the Portland office; that if those entries had been made, Turrell's practice in cashing the checks would have been discovered, but that Turrell kept the entries and notations off the merchandise accounts, cash account and all other records. There were statements regularly exchanged between the Seattle, Spokane and Portland offices, which would have shown to the plaintiff Turrell's practice, had he not manipulated the statements both going out and coming in. No one supervised Turrell in these matters. It was testified by one of plaintiff's officials and plaintiff's chief witness that Turrell, having authority, as he had, to sign checks on plaintiff's account in the defendant bank, would have been within his authority had he deposited the checks involved in this case and immediately thereupon drawn checks to "cash", thereby wiping out the full amount of the checks deposited; and that he did that very thing in some instances; and that

even the practice of drawing checks to "cash" and misappropriating the money, which Turrell did to the sum of about $7,000, was not discovered by the plaintiff during the year although those checks were shown in the returned statement and vouchers from the defendant bank to the plaintiff; and that the reason for the nondiscovery was that Turrell himself received and examined the bank statements and vouchers without supervision.

It appeared that there were statements rendered monthly with vouchers to the plaintiff by the defendant bank and by the Spokane bank and Seattle banks.

It appeared that it is a matter of common banking practice to cash checks indorsed with a rubber stamp indorsement of the kind described in the complaint, and that frequently a business concern, desiring cash, draws a check payable to itself, and then indorses it with a rubber stamp indorsement of that kind and cashes it.

The case having been submitted to the jury, a verdict was rendered for the defendant and a judgment was entered thereon (53).

Before the case was submitted to the jury each of the parties requested that certain instructions be given the jury. Among the instructions requested by the *plaintiff* were the following:

> "I instruct you that, in order for a person to be called upon to object to a wrongful or unauthorized course of practice it is necessary that he know the facts and know the practice, or that a reasonably prudent person or concern under similar cir-

cumstances would have had such knowledge in an ordinary intelligent conduct of his or its affairs. The question therefore becomes one of fact for you to determine and the burden of proof in this regard is also upon the Defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did discover, the method in which cash was withdrawn from the defendant bank on said out of town checks. The test in this regard is not what would have been discovered by the highest conceivable degree of care or by the investigation of a person abnormally suspicious, but only the care which an ordinarily prudent person or concern may reasonably be held to be bound to devote to its business and affairs under similar circumstances." (119-120, Exception No. 13.)

"In considering the question submitted to you by the foregoing instruction, I instruct you that the checks which form the basis of this action and for which Turrell received cash from the First National Bank were drawn on out of town banks other than the defendant bank. The statements received monthly by the Plaintiff from the Defendant bank indicated only the state of the Plaintiff's account with the Defendant bank and did not tend to indicate the state of the accounts on which the checks in question were drawn. Therefore, from an ex-

amination of those statements alone, the wrongful acts of Turrell in question would not be shown to the Plaintiff, nor could it thereby discover such wrongful acts of Turrell in cashing the checks in question. It would be necessary for the Plaintiff to check its accounts with the books of the out of town branches and the accounts that such branches had with the banks with which they did business. It is for you to determine as a question of fact whether the Plaintiff exercised reasonable care or was negligent in its system of checking the transactions between its Portland branch with the accounts from the various other branches. It is to be observed by you that the checks returned to the Spokane branch by the Spokane bank of deposit and to the Seattle branch by the Seattle bank of deposit, would not present any reason to believe that an irregularity had occurred since the Spokane and Seattle banks had a right, when receiving the checks through the First National Bank of Portland, with the approved rubber stamp indorsement of the General Cigar Company at Portland to the order of the First National Bank, to assume that these had passed through the hands of the First National Bank in a regular, proper and orderly manner and the Spokane and Seattle banks had the right to charge the amount of these checks against their respective depositors at those points." (120-121, Exception No. 14.)

ARGUMENT

We believe that none of the assignments of error relied on by the plaintiff can be supported, but, assuming that there were errors committed by the Court below, we submit that they were not prejudicial to the plaintiff since on the whole record in this case the defendant should have prevailed.

First, the undisputed facts appearing in the record are that the plaintiff learned on May 28th of Turrell's fraud in connection with the checks involved in this case and did not, until the following July 20th, notify the defendant of the fraud or that the plaintiff would hold the defendant bank responsible. *As a matter of law* that was an unreasonable time to wait, and under defendant's third separate answer was a complete defense to plaintiff's cause of action. That it took until July 20th for the plaintiff to ascertain the full extent of the misappropriations does not alter the situation.

It was said in United States v. National Exchange Bank, 45 Fed. 163, 167:

"There is, I think, another reason why the plaintiff should not recover. The department waited over a month, from about March 11th to April 17th, after having notice of the forgery, before returning the check to the bank, or giving any notice of its intention to hold the bank liable. This was, within all the cases, an unreasonable time to wait. The notice should have been given without unnecessary delay after discovery of the fraud, to enable the bank to pursue any remedy it might have against the forger or indorsers. *It is no doubt*

true that full knowledge of the forgery may not have been in possession of the government until the coming in of the special agent's report. But it was apprised of the fraud before March 15th, and knew substantially all that was afterwards reported of it by the agent. It certainly knew enough of it to put it upon inquiry." (Italics are ours.)

While it may have required until July 20th to ascertain the sum total of the misappropriations and all the details, it was, we contend, as a matter of law, an unreasonable time to wait before giving defendant notice of the discovery of the fraud and that the plaintiff would hold the defendant accountable.

Second, the record discloses that it was plaintiff's incredible and amazingly careless business methods and system which made the fraud of its agent possible and allowed him to continue to cash the checks in question throughout the period of a year without objection; and that even if the defendant bank had required Turrell to deposit the checks, he could have immediately drawn checks to "cash" on the plaintiff's account, as he was authorized to do, wiping out the deposit and misappropriating the money, and that practice would not have been discovered by the plaintiff and the fraud prevented; that in fact Turrell actually carried out such practice without discovery.

We submit that on those facts, together with the rest of the record as shown in the transcript, especially the testimony of plaintiff's chief witness (73-84), the plaintiff is not in equity and good conscience entitled to any money from the defendant bank.

Third, the defendant's demurrer (26) to the complaint should have been sustained.

The plaintiff has assigned eighteen errors which it avers occurred in the trial of this case. It has in its brief, however, specified only nine of those as errors (plaintiff's brief, pp. 8-10), grouping these nine relied upon under four heads, and evidently abandoning the other nine. We shall for the sake of definiteness treat the assignments of error individually as they appear in the Transcript of Record (127-153).

At the outset it is well to state certain fundamental propositions:

1. An error furnishes no basis for reversal unless covered by an assignment of error.

2. A party cannot complain of an instruction given by the Court which was justified by an instruction requested by that party.

3. If any portion of a requested instruction cannot properly be given, it is not error to refuse to give the instruction, though it contained much sound matter. That is to say, a court is not required to dissect a requested instruction. Transportation Line v. Hope, 95 U. S. 297, at top of page 301; Beaver v. Taylor, 93 U. S. 46, 54.

4. If any portion of an instruction excepted to is proper the exception cannot be sustained. Beaver v. Taylor, *supra.*

5. An exception furnishes no basis for reversal upon any ground other than the one or ones specially

called to the attention of the trial court. United States vs. U. S. Fidelity Co., 236 U. S. 512, 529; Robinson & Co. vs. Belt, 187 U. S. 41, 50.

The First Assignment of Error (127):

The first error assigned (127) is the overruling of plaintiff's demurrer to defendant's third further and separate answer. It is claimed that the ruling was error for two reasons; 1st, that no duty rested upon the General Cigar Company after it had actually discovered Turrell's fraud, the burden of which it now seeks to throw upon the defendant, to notify the defendant of the fraud and give the defendant an opportunity to proceed against the wrongdoer, and thereby obtain restitution from him; 2nd, that it does not appear from the answer demurred to that the defendant suffered any damage from the failure of the plaintiff to so notify it.

The opinion (42-43) of the court below on overruling the demurrer succinctly treats those matters and we shall here quote it:

> "It is averred by the third defense that plaintiff was apprised of Turrell's fraud a long time prior to its notification of the defendant, and that, by reason thereof, defendant was deprived of its opportunity to proceed against the wrong-doer, and thereby obtain restitution.
>
> "The plaintiff challenges the sufficiency of this answer, and urges that, even if it were plaintiff's duty to speak, the defendant cannot avail itself of the failure to fulfill that duty unless injury has ensued.

"The rule seems to be, as it respects loss through forgery, that the opportunity to proceed against the forger is a valuable one, the deprivation of which, by failure to give notice promptly, conclusively determines that loss has resulted, for there is no way by which it can be satisfactorily determined that there was no loss, unless it be shown there is on hand a fund belonging to the forger out of which the defendant can reimburse himself in whole or in part. Union Nat. Bank v. Farmers' & Mechanics' Nat. Bank, 114 At. 506, 507; McNeely Co. v. Bank of North America, 221 Pa. 588; United States v. National Exchange Bank, 45 Fed. 163.

The present case is of marked analogy. An alleged agent of plaintiff has, through representation that he was such agent, obtained funds from the bank and embezzled them. Applying the rule, it is sufficient if it appears that the plaintiff failed to notify the bank promptly of the agent's want of authority and embezzlement of the funds, and the bank was thus deprived of its opportunity to proceed against the wrong-doer. This constitutes a complete defense without the necessity of showing further that the bank could have recouped if it had been sooner notified."

The well-settled and salubrious principle, relating to strictly commercial paper, that prompt notice of the discovery of fraud is required, is supported by the authorities cited in the foregoing opinion (Union Nat. Bank v. Farmers' & Mechanics' Nat. Bank, 271 Pa.

107, 114 Atl. 506, 507; McNeely Co. v. Bank of North America, 221 Pa. 588, 70 Atl. 891; United States v. Nat. Exchange Bank, 45 Fed. 163), and by the following: National Exchange Bank v. United States, 151 Fed. 402; England Nat. Bank v. United States, 282 Fed. 121; Leather Manufacturers' Bank v. Morgan, 117 U. S. 97, at page 115.

In the case of National Exchange Bank v. United States, supra, it was said:

> "In conclusion as to this topic, the rule, as we understand it, is in entire harmony with the fundamental principles of that portion of the commercial law which relates to giving parties to commercial papers notice of default. They insist on promptness, but ordinarily require no proof pro or con on the question whether damage resulted from delays."

In the case of England National Bank vs. United States, the third paragraph of the syllabus is:

> "Where the payee's names on two checks were changed by drawer's agent, and the checks showed no evidence of this change to an experienced cashier exercising reasonable care, and bank returned the cancelled checks to drawer within a week after they were cashed, and drawer at that time discovered the forgery but did not give bank notice of it until six months later, meanwhile seizing all property of defaulting agent, bank was discharged from liability for paying these checks."

It was said in the case of Leather Manufacturers' Bank vs. Morgan supra:

> "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by attachment of his property, or other forms of proceeding to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank."

The case of Blum vs. Whipple, cited in the brief of the plaintiff, is merely an expression contrary to well-settled law.

The principle approved by the trial judge, is limited to strictly commercial paper; but it is not confined, as plaintiff contends, to the relationship of banker and depositor. The case of Union National Bank vs. Farmers' & Mechanics' National Bank, 271 Pa. 107, 114 Atl. 506, cited above, did not involve that relationship. There can be no sound reason for making any such limitations.

Coming back now to the ruling on plaintiff's demurrer, it is to be pointed out that if the plaintiff had a duty to promptly notify the defendant, the demurrer was properly overruled; for the answer demurred to expressly set out that the failure of the plaintiff to promptly notify the defendant of the fraud deprived defendant of the opportunity to obtain restitution from the wrongdoer until it was too late to recover anything from him. On the demurrer only the complaint was before the court and its allegations must be taken as true.

We believe, however, that sound principle and the authorities hereinbefore cited show that it is sufficient if it appears that there was a deprivation of the opportunity to promptly seek restitution from the wrongdoer, *and it is not necessary that it appear that benefit would have accrued to the bank from such efforts.*

Hereinafter in considering the 16th and 17th assignments of error this matter will again be alluded to.

Second Assignment of Error (128)

It is assigned as error (128) that the Court refused to allow the plaintiff to recall Witness Louisson for the purpose of impeaching defendant's Witness Jones.

Since this assignment has evidently been abandoned, it suffices to say that in the first place the ground for impeaching the Witness Jones had not been properly laid; and, secondly, even if it had been, it was surely within the trial Court's discretion to refuse to allow the plaintiff to recall Witness Louisson a second time to

impeach the Witness Jones on the very same matter Louisson had just previously been called to the stand to impeach him on.

Third Assignment of Error (135)

The third matter assigned as error (135) is that the Court gave certain instructions set out in plaintiff's Exception No. 2 (107). This assignment was also abandoned, and therefore we merely make the brief comment that not only is the instruction sound, but also it must be observed that no ground was assigned for the exception taken (107, Exception No. 2), and further that, whether right or wrong, the instruction was justified by instructions requested by the plaintiff itself.

Fourth, Fifth and Sixth Assignments of Error (136-40)

The fourth, fifth and sixth assignments of error (136-140) are directed at the following portions of the instructions given to the jury:

> "As it respects the second answer, it is a rule of law that a depositor must examine the bank's periodical statements and report to the bank without any unreasonable delay any errors he may discover, or the bank may regard his silence as an admission that the entries as shown are correct.
>
> It is alleged, among other things, that at all times from July 23, 1919, to December 15th, of the same year, the plaintiff, in addition to the three accounts carried in the defendant bank, carried accounts in the Spokane & Eastern Trust Company,

of Spokane, and the Union National Bank, of Seattle, and that each of these banks, including the defendant bank, rendered a monthly statement to plaintiff of its account therewith; that thereby the plaintiff was advised as to the exact condition of its account in each of these banks, respectively, touching the amounts of money drawn from the bank by Turrell, but made no objection thereto, and gave the bank no information touching any irregularity affecting such accounts.

If you find from the evidence in the case that such were the facts, and that the plaintiff was so advised and failed, within a reasonable time, to advise the defendant bank of such irregularities, then the plaintiff would be estopped now to assert that defendant was liable for its acts in paying the money over to Turrell in pursuance of his request or demand, and your verdict should be for the defendant.

And in this relation, I further instruct you that a depositor who has permitted his agent to verify the bank's statements is charged with notice of the fraud which would be disclosed by the examination of such statements, though not with the agent's knowledge of the fraud he may have acquired otherwise than through such statements.

If you believe from the evidence a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff, General Cigar Company, by the defendant, First National Bank, and the Spokane &

Eastern Trust Company, would have disclosed to the General Cigar Company the fact that the checks involved in the first, fourth, fifth and ninth causes of action had not been credited to the General Cigar Company's accounts with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the first, fourth, fifth and ninth causes of action.

If you believe from the evidence that a reasonably careful examination of the monthly statements rendered and cancelled vouchers returned to the plaintiff by the First National Bank and the Union National Bank would have disclosed to the General Cigar Company the fact that the checks involved in the second, third, sixth, tenth and eleventh causes of action had not been credited to the General Cigar Company's account with the First National Bank, and if you also believe that prior to July 20, 1921, the General Cigar Company made no objections concerning plaintiff's account with defendant or the cashing of these checks, you must find for the defendant on the second, third, sixth, tenth and eleventh causes of action."

(Bill of exceptions, pp. 109, 110, supra.)

The grounds, and the only grounds, given to the trial court when the exceptions were taken to the foregoing were: 1. There was no evidence in the case to

justify any such finding by the jury. 2. "The delay could not have injured the defendant in regard to the fraud occurring prior thereto." (109-110.)

What the plaintiff seems to mean by the first ground is that the General Cigar Company as a matter of law had no duty to examine the statements rendered by the defendant bank in the light of information the plaintiff received from the statements rendered by the Spokane and Seattle banks. That is to say, that although the Seattle bank statements and vouchers informed the plaintiff that a check, drawn by the plaintiff on the Seattle bank payable to itself and sent to the Portland office, had passed out of the hands of the Portland office through the defendant, First National Bank, and had been presented to the drawee, Seattle Bank, and paid by it, the plaintiff would not be called upon to object to the statement rendered by the defendant when the statement informed the plaintiff that the defendant had not given plaintiff's account credit for the check as it is claimed should have been done. That argument overlooks the fact that in this case, both the statement of the drawee bank and that of the defendant bank informed the plaintiff concerning the check. The statement and voucher from the Seattle bank informed the plaintiff that the money on the check had been received from the drawee by the defendant; and the defendant's statement showed that no credit was given the plaintiff's account by the reason of the check. Only by the most artificial sort of reasoning can the plaintiff while contending that the checks should have been taken for deposit and not cashed, claim the right to ignore the in-

formation from the Seattle and Spokane statements in connection with the examination of the statements rendered by the defendant bank.

Plaintiff's brief cites and quotes extensively from the case of National Bank of Commerce vs. Tacoma Mill Co., 182 Fed. 1, to prove the error of the trial court in this particular. It is significant that the Trial Judge, Hon. Charles E. Wolverton, who gave the instructions complained of, himself wrote the opinion in National Bank of Commerce vs. Tacoma Mill Co. when sitting as a member of this Honorable Circuit Court of Appeals. He must have known how far that opinion was intended to go and that it did not conflict with instructions given in our case. In the Tacoma Mill Co. case the Court was dealing with an entirely different state of facts. *There the Mill Co., the Court said, would have had to send out to its customers for statements of their accounts* in order to be informed that checks which should have been deposited had in fact not been credited to its account at the bank. We agree with the Court that to require that would be going too far. The Tacoma Mill Co. was *not* the *drawer* of those checks, as well as the payee—hence there were no statements from a drawee bank to be considered.

The second ground of the plaintiff's exceptions—that the delay in objecting could not have injured the defendant bank in regard to fraud occurring prior thereto—is not well taken. If the failure to object to the bank's statement works an estoppel at all, it surely covers the transactions which the statement

should have involved; in fact, those are the very transactions affected. Certainly no argument is needed in support of this.

The United States Supreme Court case of Leather Manufacturers' National Bank vs. Morgan, supra, is one of the hundreds of cases which establish that. The plaintiff evidently misconceives the nature of the principle involved.

Another point urged by the plaintiff is that, even though negligent and derelict in its failure to examine the statements properly and make an objection, still the defendant is thereby relieved from liability to it only to the extent of damage actually shown. Again we say that there is an entire misconception of the principle involved. It is a matter of ratification by the plaintiff of what has been done. Leather Manufacturers' National Bank vs. Morgan, supra, covers that point also. Any cases to the contrary are sports in the garden of law, and certainly unsound.

The propriety of the court's instructions hereinabove quoted is further questioned in the plaintiff's brief on the ground that the negligence of the defendant should have been covered in those instructions. Even if that ground were otherwise justified (and we submit that it is not, in view of all instructions), it cannot furnish a basis for reversal in this case, since it was not called to the trial court's attention in taking an exception to the instructions (108). United States vs. U. S. Fidelity Co., supra; Robinson & Co. vs. Belt, supra. Not only was no objection made to the instructions on that ground, but the plaintiff requested no instructions on

the point, all of which would, of course, lead the court to believe that the party was satisfied with that phase of the instructions.

There is still another reason, however, why error could not be predicated on the instructions now complained of. The instruction requested by the *plaintiff* (120-121, Exception No. 14) which is set out in full on pages 9-10 of this brief concludes it from objecting. The instruction requested contains matter to the effect that a checking of the statement rendered by the defendant bank in connection with the statements rendered to the plaintiff by the Spokane and Seattle banks would be necessary to detect that the checks meant for deposit were not deposited, and that it is for the jury to determine whether the plaintiff used reasonable care in that particular. Certainly the inferrence from the requested instruction is that there is a duty to so check the statements, and no question of the defendant's negligence is involved.

Still another reason for the impotency of the claim of error is that, from a mere reading of the portions of the instructions complained of, it is evident that at least some matters therein were proper, and under such circumstances the exception of course fails.

Seventh Assignment of Error (140):

The seventh assignment of error is directed at the instruction given by the court to the effect that the burden of proof lay with the plaintiff to show that Turrell cashed the checks without authority. The instructions on the subject of burden of proof are as follows:

"Now, gentlemen of the jury, I instruct you further that the burden of proof lies with the plaintiff to show that the defendant bank paid out money without authority from the plaintiff, either real or apparent.

"Defendant has the burden of proof of showing that plaintiff was advised by statements of account of Turrel's fraud and failed to notify defendant of its knowledge within a reasonable time.

"The burden of proof, gentlemen, is simply the weight of the testimony. It is such weight as would carry the scales of justice down upon one side or the other; and in considering the question as to whether these parties have made out their case by the burden of proof, as I have mentioned to you, you will determine whether the weight of testimony is upon that side." (105.)

Another instruction pertaining to the burden of proof was given verbatim as requested by the plaintiff (although the plaintiff's fourteenth assignment of error is that said instruction was not given):

"The question therefore becomes one of fact for you to determine, and the burden of proof in his regard is also upon the defendant, First National Bank, to show that the General Cigar Company, by giving in the matter of the Seattle and Spokane checks the attention and care which a reasonably prudent person under similar circumstances would have given them, would have discovered sooner than the General Cigar Company did

discover, the method in which cash was withdrawn from the defendant bank on said out of town checks." (104.)

We readily agree with the plaintiff that *the burden of proof as fixed by the pleadings never shifts. The question is, where is the burden of proof fixed by the pleadings in this case?*

The plaintiff seeks to conclude this question and establish error by invoking the rule of law, which is true in the abstract, that a party relying upon an agent's authority must prove it. In our case, however, there are two reasons why the burden of proving that Turrell acted without authority was upon the plaintiff.

First, the plaintiff has grounded its action upon a wrongful transfer of the checks by Turrell. If Turrell's act in cashing the checks was not wrongful, the defendant surely owes the plaintiff no money. The plaintiff's right to the money which the defendant received from the drawee bank relates back and is dependent upon, under the theory upon which plaintiff has brought its case, the wrongful transfer by Turrell. While the plaintiff may have been able to frame a case against the defendant without making the fact that Turrell "wrongfully and without authority transferred said check to defendant" a necessary allegation, we submit that such was not done. It must be borne in mind that the action is not one to recover a deposit. The action is grounded on the fact that the check was cashed and not deposited. In the pleadings plaintiff admits that Turrell had authority to transfer the check to the bank in one way, that is, to endorse and deposit it, but claims

that he transferred it to the bank in an unauthorized way, that is, by cashing it. Now, if Turrell transferred the check to the defendant with authority, the plaintiff could not recover from the defendant in this sort of an action. Hence it was necessary for the plaintiff to prove the wrongfulness of the cashing of the check. The plaintiff's claim, in the action as brought, depends upon Turrell's wrongfulness in cashing the check. *If the transfer was not wrongful the cashing was not wrongful.*

If the checks had been deposited with the defendant, and the defendant had then paid out the amounts to Turrell, we concede that it would in such a case be encumbent upon the defendant in a suit against it to recover the deposit to show that it paid out the money to an authorized agent.

In the case of Despatch Printing Company vs. National Bank of Commerce, relied upon by the plaintiff, the check was paid on the forged endorsement of the payee, and the *drawee* bank was being sued. It is a well-settled rule of law that a drawee bank must show that it paid a check on the order of the drawer. And, in addition, in that case the principal, in its pleadings, did not admit the broad authority admitted in our case, and so was not called upon to establish a limitation. Unless the case can be supported on one of these theories it is unsound.

Secondly, the allegations and admissions of plaintiff's reply (43-46) admit such a broad authority in Turrell in regard to checks and in respect to demanding money from the plaintiff's account in the defendant

bank that the plaintiff, depending on a limitation of that authority to exclude the cashing of checks with the defendant bank, would have the burden of proving that limitation.

It was said in the case of J. L. Mott Iron Works vs. Metropolitan Bank, 78 Wash. 294, 139 Pac. 36:

> "At the commencement of the trial the court, at the suggestion of the respondent, ruled that the burden was upon the appellant to establish its non-liability to account to the respondent for the proceeds of the check, and over the objection of the appellant compelled it to assume the burden of proof. This, in our opinion, was manifest error. Clearly, had the appellant refused to introduce any evidence, judgment could not have gone against it on the pleadings, and this is one of the tests for determining on whom rests the burden of proof. This is made plain by a most cursory examination of the pleadings. The respondent, after avering the authority of Crane to make sales of its property on behalf and to collect debts, dues, and obligations, accruing to it therefrom, and incidental authority to collect and receive and indorse for deposit checks drawn to the order of plaintiff, was forced to aver, in order to state a cause of action against the appellant, that his authority was limited in these respects, and to aver that the appellant had knowledge of these limitations. When, therefore, the appellant denied that any such limitations existed, and denied further that it had knowledge of any such limitations, if they did in fact exist, it was

incumbent upon the respondent, before the appellant could be called upon to answer, to offer some proof tending to support them. Where agency is denied altogether, the burden is upon the party alleging agency to prove it, but where, as in this case, an agency to deal with the particular subject of the inquiry is alleged or admitted, and a special limitation is relied upon to avoid liability for certain of the agent's acts concerning the matters with which he is authorized to deal, the burden is upon the party asserting the special limitation to prove it."

"The rule was not changed because of affirmative matter alleged in the answer. This may have introduced an additional issue into the case, the question whether Crane had been held out by the respondent as their general agent, but it did not cast the burden upon the appellant to show there were no such limitations upon the agent's authority as the respondent alleged existed."

In our case the admission of the agency to deal with the subject matter was in the plaintiff's reply and not in the complaint, but that cannot change the rule: for *the burden of proof is made by the pleadings*.

It is to be remembered that the plaintiff admits by the pleadings that had the defendant credited the amount of the checks to the plaintiff's account and subsequently permitted Turrell to withdraw the fund, Turrell would have been within his authority. Plainly the plaintiff is depending on a limitation of the authority of one who is confessedly a broad agent to deal with the matter.

The fact that the defendant in addition to denying the lack of authority and the limitation of the agency, sets up itself affirmative allegations of a broad agency does not change the burden of proof, as is pointed out in the above quotation from the Mott Iron Works case.

That the plaintiff felt the burden of proof to be upon it to prove the limitation on Turrell's authority, and that it felt that the proof of the limitation was essential to its case, is evidenced by the testimony it adduced at the trial (See Bill of Exceptions, Mr. Louisson's direct testimony, transcript of record, 73-76).

We submit that as the issues were made in the pleadings it was essential to the plaintiff's case to prove the limitation in Turrell's authority and that his cashing of the check was wrongful; and hence the burden of proof in that respect was upon it.

Eighth, Ninth, Tenth and Eleventh Assignments of Error (141-145):

These assignments of error are abandoned by the plaintiff and not treated in its brief. Clearly they were not well taken. The court instructed much of the matter requested and the remainder was unsound, improper or irrelevant. And, besides, when part of a requested instruction is given, it is encumbent upon the party when taking an exception to the refusal to give an instruction requested to point out to the trial court the variance between the instruction given and the one requested.

Twelfth Assignment of Error (145):

This assignment of error grounded upon the refusal of the court to give a requested instruction, raised again the question of burden of proof which was treated above when considering the Seventh Assignment of Error. The argument therefore need not be repeated here. There are additional answers to this assignment, however, in that some of the matters contained in the requested instructions are clearly improper even assuming that others are proper. For instance:

> "The bank can justify itself and prevent a recovery of this case only by proving that the money was placed to the credit of the General Cigar Company or was otherwise used for the benefit of the General Cigar Company, and, it being admitted that it was not credited to the General Cigar Company but was paid to Turrell, the bank must show that when it made a payment to Turrell, it was under Turrell's authority paying the money to the General Cigar Company.' (147.)

The above is clearly unsound in that it ignores all of the defenses of defendant except the one of authority. A court can rightfully decline to dissect a requested instruction in order to pick out the sound parts, and it is not reversible error to refuse to give such an instruction.

Thirteenth Assignment of Error (147):

The assignment is abandoned by the plaintiff. There was manifestly no error committed. The substance of part of the requested instruction was given; and a portion of the matter refused was merely an instruction on

the facts which the court had a right to leave for the jury without instruction; and a portion of the matter refused was clearly improper as limiting the factors and circumstances in the case from which the jury could find either actual or apparent authority.

Fourteenth Assignment of Error (148):

Here an error was assigned for refusal to give a requested instruction, which was in fact given by the court verbatim as requested. (104.)

Fifteenth Assignment of Error (149):

This assignment raises again the question of estoppel by reason of the return of vouchers and the rendering of statements, which was dealt with hereinbefore when considering the Fourth, Fifth and Sixth Assignments of Error. And here there is an additional answer to the claim of error in that much improper matter was contained in the requested instruction.

Sixteenth Assignment of Error (150):

This assignment of error is the refusal of the court to give the following requested instruction:

> "The defendant bank as one of its defenses in this case asserts that the plaintiff, General Cigar Company, knew of the course of conduct on the part of Turrell with reference to the checks in suit, for a long time prior to communicating that knowledge to the defendant bank, and that the bank was thereby deprived of an opportunity to recover all or a part of the loss. I instruct you that by facts stipulated in this case, it appears that all of Tur-

rell's property was attached by the General Cigar Company at a time when it knew only of Turrell's embezzlement by means of checks payable to cash, not involved in this action, and that shortly thereafter the property so attached and all of Turrell's property acquired during the period of defalcation, was turned over to one J. H. Tipton as Trustee and that the question of the application of the proceeds of said property is one of law upon which this court will pass, the facts being admitted and it affirmatively appears from such admitted facts that no harm has resulted to the First National Bank by reason of any such alleged delay. I instruct you, therefore, to disregard the third further and separate defense on the subject of loss to the bank through alleged delay in notifying it of the claim which is the subject of this action." (150.)

The instruction was properly refused for several reasons. In the discussion hereinbofore when considering the First Assignment of Error (to which we now direct attention) it was pointed out by argument, citation and quotation that on principle and authority an unreasonable delay in reporting the fraud would relieve the defendant from liability in this case without showing any damage from the delay other than the deprivation of the opportunity to promptly seek restitution from the wrongdoer. As is often said by the courts, the opportunity is a valuable one and it need not appear that benefit would necessarily have accrued to the defendant from the effort. It cannot be said that the defendant could not have benefited had it received notice of the

fraud prior to July 20th, when it was notified. The defendant had a right to make its own efforts to recoup.

We submit that it would be no answer to the defendant's defense to show that the plaintiff had already proceeded to seize Turrell's property to cover other misappropriations before even learning of the fraud involved in this case. There is nothing in the record to show that the defendant could not have pursued proceedings which would have availed it something. At any rate, it is not now susceptible of proof that pressure on the wrongdoer by the defendant would not have aided the defendant. The requested instruction mentions a stipulation between the parties in regard to the defendant's *fourth* separate defense, this being the stipulation noted at page 73 of the Transcript of Record, but the terms of which are not shown at any place in the record. The statement in the plaintiff's brief at page 49 to the effect that by the stipulation the plaintiff agreed to allow the defendant to share in the property which Turrell had turned over to the plaintiff, *is an error.* No such agreement was ever made, and, furthermore, the plaintiff contends in its reply (50-52), and in every other instance in which the matter is mentioned, that it, with Turrell's active consent, applied the proceeds of the property, turned over by Turrell, to make good other misappropriations which Turrell had been guilty of, and not the misappropriations involved in this case. Furthermore, there is nothing to show that Turrell had not acquired other property between the time of the attachment spoken of and the time that the fraud involved in this case became known to the plaintiff. And

again, it is admitted by all that Turrell did not deed and assign the property to the plaintiff until after the plaintiff knew of the fraud out of which this case grows.

But there is another fatal reason why the plaintiff cannot claim error in the court's refusal to give the requested instruction. The plaintiff allowed the court to give *without objection* the hereinafter quoted instruction which left to the jury the third further defense of the defendant which the plaintiff's requested instruction would take away from the jury. The instruction not excepted to is as follows:

> "As it appertains to the third further and separate answer, I instruct you that, if you believe from the evidence that plaintiff learned on or about May 28, 1921, of Turrell's fraud in connection with the moneys received from defendant bank on the checks involved here, and you further believe that plaintiff did not promptly notify the defendant that plaintiff would hold it responsible for such moneys paid to Turrell, then you will find for the defendant. Prompt notification would be such as a prudent man would exercise within a reasonable time, so as to advise of the situation." (104-5.)

The foregoing instruction not having been objected to, the court had a right to believe that it was satisfactory.

Seventeenth Assignment of Error (151):

The error here assigned is that the court refused to give a requested instruction in lieu of another that the court had refused to give, the refusal to give which was

assigned as error by the plaintiff under the Sixteenth Assignment of Error just considered.

The proper matters contained in the requested instruction were incorporated in the given instructions last quoted above. And the court very properly refused to instruct that the plaintiff could wait until it compiled all the data concerning Turrell's fraud before notifying the defendant of the fraud at all. Instead the Court left that question of reasonableness to the jury. And again, the requested instruction stated that the plaintiff notified the defendant of the fraud on *June* 20th, while the undisputed testimony was that notice was not given until *July* 20th.

Eighteenth Assignment of Error (153):

This assignment is directed at the denial of plaintiff's motion for a new trial on the grounds of the alleged errors involved in the assignments of error which have already been treated in this brief.

Taking the whole body of the instructions given by the court we submit that the law was properly presented to the jury. For a second time the trial court had an opportunity to consider the matters which the plaintiff claims were errors when the court was called upon to pass on the plaintiff's motion for a new trial. The court concluded that no errors had been committed. We submit that the conclusion is correct.

Respectfully submitted,

DOLPH, MALLORY, SIMON & GEARIN and
EDGAR FREED,
Attorneys for Defendant in Error.